UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, MICHIGAN,	.	Docket No. 13-53846
	.	Detroit, Michigan
	.	September 19, 2013
Debtor.	.	3:00 p.m.
. . . . .		

HEARING RE. MOTION BY OFFICIAL COMMITTEE OF RETIREES TO STAY DEADLINES AND THE HEARINGS CONCERNING A DETERMINATION OF ELIGIBILITY PENDING DECISION ON MOTION TO WITHDRAW THE REFERENCE; MICHIGAN COUNCIL 25 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AND SUB-CHAPTER 98, CITY OF DETROIT RETIREES' MOTION TO COMPEL TESTIMONY OF KEVYN ORR AND ALL OTHER CITY AND STATE WITNESSES REGARDING CITY-STATE COMMUNICATIONS PRIOR TO JULY 17, 2013
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:	Jones Day By: BRUCE BENNETT 555 South Flower Street, Fiftieth Floor Los Angeles, CA 90071-2452 (213) 243-2382
For the State of Michigan:	Dickinson Wright, PLLC By: STEVEN G. HOWELL 500 Woodward Avenue, Suite 4000 Detroit, MI 48226-3425 (313) 223-3033
For Official Committee of Retirees:	Dentons By: CLAUDE D. MONTGOMERY 620 Fifth Avenue New York, NY 10020 (212) 632-8390
For AFSCME, AFL-CIO, and Sub-Chapter 98, City of Detroit Retirees:	Lowenstein Sandler, LLP By: SHARON L. LEVINE 65 Livingston Avenue Roseland, NJ 07068 (973) 597-2374

APPEARANCES (continued):

For UAW:	Cohen, Weiss & Simon, LLP By: THOMAS N. CIANTRA 330 W. 42nd Street New York, NY 10036-6979 (212) 356-0228
For General and Police and Fire Retirement Systems:	Clark Hill By: JENNIFER K. GREEN 500 Woodward Avenue, Suite 3500 Detroit, MI 48226 (313) 965-8300
Court Recorder:	Letrice Calloway United States Bankruptcy Court 211 West Fort Street 21st Floor Detroit, MI 48226-3211 (313) 234-0068
Transcribed By:	Lois Garrett 1290 West Barnes Road Leslie, MI 49251 (517) 676-5092

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE CLERK: Court is in session. Please be seated. Recalling Case Number 13-53846, City of Detroit, Michigan.

THE COURT: I'd like to proceed with the motion for a stay first and then the motion to compel. Is that okay with everybody?

MR. MONTGOMERY: Yes, your Honor.

THE COURT: All right. Let's hear from counsel for the retiree committee. You may proceed, sir.

MR. MONTGOMERY: Thank you, your Honor.

THE COURT: Excuse me one second. And now you may proceed, sir.

MR. MONTGOMERY: Thank you, your Honor. Claude Montgomery for the Official Committee of Retirees in the City of Detroit case. We are here before you this afternoon, your Honor, and request to this Court to stay its hearings in connection with the eligibility determinations being made under Section 109 of the Bankruptcy Court and in that regard to stay any deadlines associated with that process. We are not seeking to stay any discovery matters. We are not seeking to stay any other aspects of the case in front of the Court. We are merely seeking to stay the eligibility determination itself. And, your Honor, the reason --

THE COURT: All of the objections that everyone filed, not just your objections.

MR. MONTGOMERY: Correct. And we are doing so

because we think that this Court has a constitutional infirmity with respect to our eligibility issues and many of the specific eligibility issues raised by the parties and that ultimately only the District Court, as an Article III court, may hear the issues that go to the resolution of the private rights that we think this Court must deal with in order to get to the 109(c)(2) issues.

Now, we agree with the debtor on a number of things in connection with this case surprisingly. One is, of course --

THE COURT: All right. So over the break we were advised that the reason the microphones die momentarily, as some of you witnessed this morning, is because they are too close and we are talking too loudly into them, so maybe push it a little bit further away.

MR. MONTGOMERY: Farther away and less projection?

THE COURT: Yeah. Still tilt it down towards you, though, yeah. Let's try that and see if that will solve the problem. Go ahead.

MR. MONTGOMERY: Thank you. Perhaps it was the fact that I suggested we might agree with the debtor on something that caused the microphones --

MR. BENNETT: Maybe the mikes didn't believe you.

MR. MONTGOMERY: But we do, that the automatic stay is in place and will stay in place to the benefit of the

debtor unless and until an adverse eligibility determination is made under 109(c)(2) or a court dismisses for lack of good faith afterwards.

Now, we do think that we also agree with the city that we have raised state law issues. They think they are groundless. We think they are material. We do agree that we have raised constitutional issues. We think they are dispositive constitutional issues arising under state law, and we think there are strong challenges under federal law if -- if -- the Court is required to reach them. We also think that the Michigan constitution -- and this we do not agree -- deprives the state of the ability to assert that the authorization papers, which it has presented to this Court in connection with the motion to confirm eligibility, can be accepted by this Court because they reflect an avowed open public purpose which we say is unconstitutional under Michigan law. If that purpose is legislatively authorized, then the legislation runs afoul of the Michigan constitution and that neither of those questions, whether or not the purpose and the factual findings that must be made by this Court related to the purpose nor the determination of the nature of the conflict between the Michigan constitution and the statute, PA 436, can be resolved by an Article I court. And, your Honor, this issue comes up because we filed our objections to eligibility raising these state law issues and

these federal constitutional issues. We then immediately filed our motions to withdraw the reference, and a couple of days later we filed our motion for a stay, so it is -- the motion to withdrawn reference, that is the matter for which we need to argue success or lack of success with respect to our entitlement to a stay of proceedings, not the underlying question of eligibility.

Now, the city calls our effort a groundless procedural gamble. That's their quote, not ours, your Honor. And we assert, your Honor, that our challenge to eligibility is not groundless nor is the challenge to jurisdiction groundless, and the reason we believe so and are invoking the protections of the Article III judges of this district is because the challenge to the jurisdiction of the Court requires this Court to make a final determination on an issue of state law because it cannot get to the question of authorization without passing through the objections that raise the state law constitutionality issue as it applies to the purpose, as it applies to the governor's authorization, and as it applies to the enabling legislation under PA 436.

THE COURT: Well, but you're -- what is that? Not yours? Is your argument so broad as to say that the Bankruptcy Court never has the authority to rule on an issue of state law?

MR. MONTGOMERY: No, but where there's consent,

sometimes --

THE COURT: Absent consent.

MR. MONTGOMERY: Absent consent, we think if there's a private right at stake, Stern teaches us that you require judicial authority to reach those determinations, and if that judicial authority in this context requires a final determination as is apparently available to the Court under 157, then we think there's constitutional infirmity and that Stern teaches --

THE COURT: But I want to ask again --

MR. MONTGOMERY: Sure.

THE COURT: -- does that mean a Bankruptcy Court cannot render a final judgment on any claim before it when the resolution of that judgment -- or the entry of that judgment depended on the Bankruptcy Court's determination of a question of state law?

MR. MONTGOMERY: Your Honor, I don't know where the line is on that, frankly. I do know the Supreme Court tried to say this is a narrow decision.

THE COURT: So you're not arguing that.

MR. MONTGOMERY: I am not arguing that.

THE COURT: All right.

MR. MONTGOMERY: I'm arguing --

THE COURT: So what's the difference between what you are arguing and that?

MR. MONTGOMERY: The bottom line really is, your Honor, that we don't see how an Article I court can deal with issues of constitutionality that deal with private rights.

THE COURT: Okay.

MR. MONTGOMERY: Bottom line.

THE COURT: What in Stern versus Marshall says that?

MR. MONTGOMERY: We think that Stern versus Marshall teaches us that where a private right not coming from the federal system is at issue, that that is what raises the constitutional problem that requires an independent judiciary to make the determination. Here the private right that is at stake in the eligibility determination is whether or not the state constitution protects the pension rights under the pension clause. That is, if you will, relatively narrow. Some might say it's a big question, but I think it's a relatively narrow question. We are not here --

THE COURT: Are there any cases that hold that a Bankruptcy Court cannot rule on a constitutional question in the context of a claim for relief that it would otherwise have jurisdiction over under Stern versus Marshall?

MR. MONTGOMERY: Well, Stern itself, of course, because the Stern court recognized that the decision that it was overruling was a core decision, and --

THE COURT: Well, but the issue -- the claim that was involved in Stern was a counterclaim to a proof of claim

on a state law cause of action.

MR. MONTGOMERY: Absolutely.

THE COURT: My question was is there anything in Stern that says a Bankruptcy Court can't rule on a constitutional question when it would otherwise have complete jurisdiction over the claim for relief that's being requested?

MR. MONTGOMERY: I think Judge Rakoff in the Picard case basically comes to that point where he says that where you are dealing with an interplay of federalism and state law, the reference should be withdrawn, and that's what he did in that case, so we would cite you to the Picard case that's in our brief for that purpose.

THE COURT: But did the Picard case deal with a constitutional question?

MR. MONTGOMERY: Well, it was -- it ended up being whether or not you could raise in the context of a -- I believe it was -- this comes out of the Madoff cases in which there were challenges by the Madoff trustee against the parties who had taken money or received money out of the case --

THE COURT: Right.

MR. MONTGOMERY: -- and so basically the trustee was trying to get it back, and the --

THE COURT: A clawback action, yeah.

MR. MONTGOMERY: Yeah, clawback action. And the participants were saying, as a matter of state law, you couldn't do it, and as a matter of constitutionality, no subject matter jurisdiction to make the requisite findings either of liability or good faith, and so those are pretty simple in our ordinary parlance, our pre-Stern parlance, pretty simple determinations of state law.

THE COURT: Okay. But in that case, the claim for relief was fraudulent transfer; right?

MR. MONTGOMERY: Correct, or variations thereof.

THE COURT: Right, which is, in the view of many courts, not within the core function of the bankruptcy process.

MR. MONTGOMERY: Well, your Honor, in my early days I thought that was central to the bankruptcy --

THE COURT: Well, lots of people did, but it's a long way from a fraudulent transfer action to an eligibility determination, the basic question about whether a party is entitled to be in bankruptcy.

MR. MONTGOMERY: Yes. As the Bridgeport case teaches us, your Honor, if it can be relied upon for the proposition that mere -- the existence of authorization papers filed by the party is not enough -- you have to go behind those to see whether or not, as a matter of state law, there, in fact, was an entitlement for the city officials to

file the pleadings they did, and in the Bridgeport case they said the answer was no. Those are pure state law issues. In fact, I believe the case law generally supports the proposition that the 109(c)(2) issue to be decided is a state law issue.

THE COURT: Fair enough, but you're not arguing that in the Bridgeport case anyone found that it was inappropriate for that bankruptcy judge --

MR. MONTGOMERY: No one raised it.

THE COURT: -- to come to that conclusion. Right. No one raised the issue.

MR. MONTGOMERY: No one raised it. Similarly, no one raised it in --

THE COURT: All right. Besides Judge Rakoff's view in Picard, are there any other cases that hold that when a constitutional issue is raised, a Bankruptcy Court can't hear it?

MR. MONTGOMERY: I would also point your Honor to the Sutton case, which was a default case, again, sort of in the context of a recovery action by a trustee, and in the Western District of Michigan, the judge in the Sutton --

THE COURT: Right, but --

MR. MONTGOMERY: -- case finds that it's a fundamental right to have an independent oversight of an Article III court.

THE COURT: Fair enough, but what was the constitutional issue that a Bankruptcy Court would have to decide in resolving the merits of the claim?

MR. MONTGOMERY: I don't think there was one.

THE COURT: That's what I'm asking you.

MR. MONTGOMERY: But, again, so I guess my suggestion to the Court is that if an ordinary private right cause of action is something that the Supreme Court has said the Article III judges should be looking at, how much more so must it be if a constitutional issue of state law is raised, not a contract enforcement action, not a legislative is there a right of recovery.

THE COURT: Right, so how do you deal with the city's argument that the answer to that question is the question before the Bankruptcy Court is the eligibility of the debtor to be in Bankruptcy Court? That's the question.

MR. MONTGOMERY: Absolutely, your Honor.

THE COURT: And there's nothing in Stern versus Marshall or any other case, for that matter, which says that the Bankruptcy Court can't rule on all issues, legal, factual, constitutional, in deciding that ultimate question.

MR. MONTGOMERY: If your Honor were to say that eligibility was solely a function of federal law, I would have to agree with your Honor, but the cases teach us that eligibility is not a function of federal law. It's a

function of state law.

THE COURT: Well, but, see, I thought we moved past that with my first question, which was are you arguing that merely because the Court has to decide a state law question, Stern versus Marshall applied, and you said you didn't know that, "A," and you weren't sure where the line was.

MR. MONTGOMERY: I did say that, but what I am also suggesting to your Honor, that when the state law question is one of constitutionality and the right of the people of the State of Michigan to control their executives through their constitution, I think that is a relatively unique and narrow set of circumstances, a narrow set of circumstances for a court to deal with.

THE COURT: Okay. One more question on this, and then we can move on to the other considerations.

MR. MONTGOMERY: Yes, please.

THE COURT: There's lots of case law which says that the Court whose jurisdiction is challenged determines first the challenge. At least according to the city's papers there's that case law. How do you deal with that?

MR. MONTGOMERY: I say to you again that where the question is the constitutional limits of a Court's own jurisdiction, that that requires the party with the authority to resolve constitutional issues under our system to do it. And really the only place where there are any general

jurisdiction for constitutional issues is either in the federal courts or in the state courts with respect to their own systems.

THE COURT: Um-hmm.

MR. MONTGOMERY: And here a federal court, which is, unfortunately, not an Article III judge -- an Article III court, is being asked to resolve that question.

THE COURT: So you would say that the Tax Court and the Federal Court of Claims, both of which are Article I courts, don't have jurisdiction to hear constitutional issues?

MR. MONTGOMERY: Certainly not under state law.

THE COURT: How about under federal law?

MR. MONTGOMERY: I don't know the answer to that, and I'm not going to --

THE COURT: You're arguing that this Article I court doesn't have jurisdiction to consider your challenge to Chapter 9 of the Bankruptcy Code, aren't you?

MR. MONTGOMERY: Correct. No question that I'm asserting that.

THE COURT: All right. So why would the Tax Court or the Federal Court of Claims be any different?

MR. MONTGOMERY: Because we have a Supreme Court which has identified at least this Article I court as having limitations.

THE COURT: Well, but there's nothing in Stern versus Marshall that would suggest that the Supreme Court was picking on Bankruptcy Courts, is there?

MR. MONTGOMERY: Well, there actually is one thing that suggests it, which --

THE COURT: What?

MR. MONTGOMERY: And that is that the -- the notion coming out of the Supreme Court that Congress can't give to a legislated body the right to decide questions of state law, and the Court picked on the Bankruptcy Court because of the private rights theory.

THE COURT: Fair enough, but I'm asking you about an Article I court's authority to rule on a federal constitutional issue --

MR. MONTGOMERY: Well, if --

THE COURT: -- because you make that challenge, too, whatever its merits are.

MR. MONTGOMERY: Whether or not a public entitlement can be challenged on a constitutional basis in the Article I court charged with resolving that public entitlement is not a question that we should have to deal with today, and I don't think it is necessary, with all due respect, your Honor, to find out what the limits of Stern are. The only question we are suggesting to your Honor, that this relatively narrow exception where this Court under all authority is told that

the eligibility determination is a function of state law and that this Court does make a final ruling from which no stay can be had under 921, that's pretty clearly a final resolution of a private right question if the authorization issue has to go through another state's constitution as it has to do in this case. And the constitutional impairment issue for the pension clause is whether or not an unelected official can seek recourse to this Court to deprive people of their pension rights, and that is a very different, I would say, kettle of fish than your ordinary question, and it is the specialness, if you will -- I know that's not really a word, but the special nature of the circumstances --

THE COURT: Um-hmm.

MR. MONTGOMERY: -- that we are asking this Court to take into consideration in deciding whether to offer a stay.

THE COURT: Um-hmm.

MR. MONTGOMERY: Now, if I may turn to some of the other --

THE COURT: Yeah.

MR. MONTGOMERY: -- issues that you must deal with, which is what is the standard for granting a stay, well, again, it is not mere possibility of success. The debtor's -- the city's papers misquote the -- our assertion. We say that it has to be more than a mere possibility of success. Specifically, the probability of success that must

be demonstrated is inversely proportional to the amount of irreparable injury absent the stay. Simply stated, one or more excuses of the other, less of the other, and a stay may issue so long as more than the mere possibility of success on the merits is shown and for which we cite the Michigan Coalition of Radioactive Users coming out of the Sixth Circuit.

Now, the -- we, again, assert, your Honor, that the -- we've already talked about the likelihood of success. Your Honor has a feeling one way or another, maybe even a decision one way or another on that point, but we think it's more than a mere possibility, so then we turn to the question of how do we balance the injury --

THE COURT: Um-hmm.

MR. MONTGOMERY: -- that we say exists here, and we say the injury in the motion to withdraw the reference, not in the eligibility question, but in the motion to withdraw the reference is are we being deprived of having access to the proper court to deal with our issues, which under Sutton is looked at as a due process question, but we say it's a very simple issue. If we believe that your Honor has to decide a constitutional issue and we are right that an Article III court should decide the constitutional issue, is the possible deprivation of that right an irreparable injury? And I believe the Sixth Circuit in the Obama versus Ohio case

says that the mere possibility or threat of an injury to a constitutional right should be looked at as irreparable injury. And, again, in that particular case, the voting rights case, it was a First Amendment assertion. Nothing had actually happened yet somewhat like the city is arguing, we haven't done anything yet, we don't know that anybody is not going to vote, we don't know that anybody -- despite our statements to the contrary, we don't know that anybody is going to lose their pension rights, but the threat is unequivocally present. The emergency manager has made repeated statements. He's filed declarations, all of which inform publicly --

THE COURT: I'm missing the link between denial of the stay and a deprivation of your right.

MR. MONTGOMERY: Oh, it's the constitutional right. The constitutional right is do the retirees of the City of Detroit have the constitutional right to have the correct court make the first determination.

THE COURT: Right, but how does denial of a stay result in that deprivation?

MR. MONTGOMERY: Your Honor, if you hold the hearings and you make the determination, that is why the injury could occur because we say the wrong court is dealing with the question. If your Honor doesn't issue a stay but, in fact --

THE COURT: You don't have access to the District Court after that?

MR. MONTGOMERY: But an appeal of a determination is not the same thing as having the determination made in the first instance.

THE COURT: Why not?

MR. MONTGOMERY: First, factual findings --

THE COURT: The District Court's review would be de novo in either instance.

MR. MONTGOMERY: Well, if this was a core matter and if this Court had the jurisdiction to deal with it, neither of which --

THE COURT: Are you asserting that the Court's determination about the eligibility to be in bankruptcy is not a core matter?

MR. MONTGOMERY: No. In fact, that's the problem. This is just like Stern in that regard. It is unquestionably a core matter, and so you unquestionably have the right to make formal findings.

THE COURT: Right, but the issue of whether -- the issue of whether either Chapter 9 or PA 436 is constitutional is a legal issue that the District Court would review de novo. Yes?

MR. MONTGOMERY: Yes, but I think --

THE COURT: Yes?

MR. MONTGOMERY: Yes.

THE COURT: So how does denying a stay deprive you of access to the District Court?

MR. MONTGOMERY: Your Honor, I think it's the -- if review were a sufficient salve on the injury of having the wrong court make the decision, I don't think Stern would have reversed because, "A," --

THE COURT: Oh, well --

MR. MONTGOMERY: -- we're in an appeal process, and, "B," the --

THE COURT: Stern versus Marshall involved a case with very substantial disputes as to fact which the Bankruptcy Court had resolved and which the Court held that the District Court should have resolved, and we all know that there's a difference between the District Court trying an issue of fact in the first instance, on the one hand, and on the other hand a District Court reviewing a Bankruptcy Court's findings of fact.

MR. MONTGOMERY: And, your Honor, we have suggested in our papers both on the eligibility question and in our motion to withdraw the reference that your Honor or whoever is the decider will have to make factual determinations as part of the question of the determination of constitutionality. Specifically, if there is an unlawful purpose, in order to reach the conclusion that it is an

unlawful purpose, you have to make findings of fact as to what the purpose was. You can't get to the question of lawfulness without going through the fact of purpose, and here there may be some argument as to what the purpose is. The city in its response paper says nothing has happened as if what are we complaining about, as if there wasn't some reality to the emergency manager's statements of his intention both before and after he filed the case, so I expect your Honor to have a real live fight with lawyers, you know, making their challenges and, you know, complicating your life in making the decision-making that you're going to do, but it's going to be final when it's over for you because if you're -- if the city is right, it'll be a core matter. There will be factual findings that have to be reviewed not on a de novo basis.

THE COURT: Um-hmm.

MR. MONTGOMERY: And so we think that's why your Honor needs to be especially sensitive to the question of what court is doing it. You know, basically we're asking the Court to see the danger in having the citizens of Michigan, who are the retirees of the city, have the wrong court make the factual determination as to whether or not the purpose for which this filing occurred was or was not one that Article IX, Section 24, of the Michigan constitution --

THE COURT: Of course, if the Court -- if this Court

does issue a judgment that involves findings of fact that result from a trial and disputed issues of fact, the District Court could just treat them as proposed findings of fact and conclusions of law if it agrees with you on Stern versus Marshall. Yes?

MR. MONTGOMERY: It could do that or vacate and start over. It could do a number of things.

THE COURT: Right. So if all that is true, where's the injury to your client?

MR. MONTGOMERY: The injury, your Honor, is at the beginning of the process, and the beginning of the process is, in effect, once this Court or the District Court makes that determination, the gavel comes down, eligibility, right, there's no more possibility of a stay or a slowing down of the process. Specifically, if your Honor -- at least as I read the statute, if your Honor has the jurisdiction to make the determination and you make the determination of eligibility, the District Court to whom the appeal is made can't stay it because 921 says so. So it's got to go back in order to do anything of that nature decide that there was no subject matter jurisdiction to begin with here, and if there's no subject matter jurisdiction, why are we doing this? And so we say to you the injury under the Obama case, the threat to constitutional rights, the threat to due process problems --

THE COURT: Were you in court this morning when the --

MR. MONTGOMERY: Was not.

THE COURT: -- retirees addressed the Court?

MR. MONTGOMERY: I was not, your Honor.

THE COURT: Perhaps you heard that several of them expressed the most profound concern about the uncertainty resulting from these proceedings about whether they will receive their pensions or not suggesting, doesn't it, that it's in their best interest to get to the answer to that question as promptly as possible?

MR. MONTGOMERY: I suspect your Honor also heard, although I don't know this because I wasn't here, that some of the retirees said we want to also make sure that the right court hear -- that there is a history almost --

THE COURT: You're absolutely right. Some of them said that, but I want to hear what you say about my question.

MR. MONTGOMERY: Well, your Honor, the pace at which the proceeding moves is an important one for both sides, but we, the retiree committee, believe that the more important question than pace is who and whether or not that party -- that is, the correct who to decide -- sets a pace that is accelerated or slow. And whoever the -- your Honor has made a determination as to what the right pace is. We know that October 23 and October 24 we are going to have a hearing in

front of you on eligibility. You have made that determination, and everybody is running like crazy to get there. Whether or not an Article III judge would have exactly the same process, something slightly different, I don't know, but I do think it's important to the process of shaping the findings of fact that the trier of fact have a role if it's judicial in how that occurs, and that is why we're asking for the stay. And if I may --

THE COURT: And how do you deal with the city's argument that it would suffer irreparable harm if the stay is granted?

MR. MONTGOMERY: First, I would point out that the automatic stay is in place and that your granting of a stay, your Honor, were you to do it, does not affect their right to be in this court pursuant to the automatic stay and that they still have the protections from creditor seizure no matter what happens.

Second, I would point out to your Honor that there's a range of time lines that have occurred in cases where eligibility is found. There have been two months, three months, and the Stockton case took a full year in which the process worked itself out. Now, we are certainly not suggesting that it take a year. In fact, we're hoping it does because we'd just as soon that the pension issue was resolved long before that on behalf of the retiree committee,

in effect working myself out of a job, and -- but --

THE COURT: Well, Stockton only took a year to get to eligibility because the parties asked the judge to hold the decision in pocket pending their discussions and negotiations.

MR. MONTGOMERY: And which the city has not asked here, as far as we know has not asked for that to happen. Otherwise they would probably be joining us in some fashion or another, so we assume that the city believes --

THE COURT: Right. But the city's argument about its prejudice from a stay here is more fundamental than that, isn't it? They argue they need to get to plan confirmation -- plan negotiation and then plan confirmation as promptly as possible because, at a minimum, city services are impaired. We heard those stories here this morning as well, some of which were very tragic and compelling, and they need to get on to the business of rebuilding the city.

MR. MONTGOMERY: And thanks to your Honor, they're actually doing that because you set forth a mediation order.

THE COURT: Well, but if we put off the eligibility hearing --

MR. MONTGOMERY: But, your Honor --

THE COURT: -- we're putting off the whole process accordingly.

MR. MONTGOMERY: I would say not because right now

there's no --

THE COURT: You've asked for a delay of all the dates.

MR. MONTGOMERY: I was going to make a slightly different point if I may, your Honor --

THE COURT: Okay.

MR. MONTGOMERY: -- which is that the city is actively engaged in negotiations with multiple parties over what a plan might look like in this case through the mediation process, which your Honor set forth. Your Honor has already dealt with, in effect, the possibility of delay by asking Judge Rosen to crack heads and move people, which is what he is doing.

THE COURT: Well, that's not exactly the language I used with him. Okay. I'll accept it.

MR. MONTGOMERY: If I misunderstood, please tell me.

THE COURT: No. I did tell him that his -- I'll share this with you. I did tell him that his deliverable is a confirmable plan.

MR. MONTGOMERY: And so we say that to the extent that the inability to engage with creditor constituencies might arise from a delay in eligibility, we say that's demonstrably not true.

THE COURT: Okay.

MR. MONTGOMERY: All right. And the last issue, I

think, just goes back to the first, which is where does public interest sit --

THE COURT: Right.

MR. MONTGOMERY: -- and here we think having the right court make the right decision on the constitutionality question is it.

THE COURT: All right.

MR. MONTGOMERY: Thank you.

THE COURT: Thank you, sir. All right. Before I hear the city's argument, I'm going to take a ten-minute recess.

THE CLERK: All rise. Court is in recess.

(Recess at 3:34 p.m., until 3:42 p.m.)

THE CLERK: Court is in session. Please be seated.

THE COURT: Sir.

MR. BENNETT: See if I can get this right.

THE COURT: But not too close.

MR. BENNETT: Not too close. Good afternoon, your Honor. Bruce Bennett, Jones Day, on behalf of the city. I want to go to a couple of small points and then get to the center of some of the disputes or discussions that you had a few minutes ago.

First of all, the Bridgeport case was, of course, decided by a bankruptcy judge, not by a district judge, and, second, on the Court's jurisdiction to consider

constitutional issues, it is, of course, the case that in Stern it started at a bankruptcy judge even though there was a constitutional issue. It wasn't withdrawn to the District Court because there was a constitutional issue raised below. And in Waldman and the long series of post-Stern cases have similarly started in a bankruptcy judge and worked their way up through the system -- through the appellate system, and they were not removed to the district judge. If they were removed to the district judge, there would have been nothing for Waldman to decide, so we have, I think, ample evidence of the fact that the rules that we cited in our papers and the cases that we cited in our papers about courts having jurisdiction to determine their own jurisdiction are alive and well.

Now, I think there are a lot of very easy ways to determine that there are no serious issues on the merits here and that there is really no prospect that the District Court is going to be inclined to withdraw the reference. Number one -- and I think you got to it in a slightly different way -- there's a very big difference when you read the cases between those cases that involve the possible assertion of a jury trial right and those that don't because where a jury trial right is involved and there is a problem with the Bankruptcy Court's jurisdiction, the reference has to be revoked because the Bankruptcy Court doesn't have the power

to conduct a jury trial. The consequence if a bankruptcy judge does not have the power to hear a case on other than a jury trial ground, the consequence is that the bankruptcy judge enters recommended findings and conclusions. And, your Honor, the way that works is your Honor decides that. I think, frankly, the Rakoff decision in Madoff is a very significant outlier, and when you really read it, the footnote that the retiree committee pointed to, what Judge Rakoff is saying there is that he wants to make the decision as to whether to withdraw the reference, not that he thinks that there is a constitutional issue embedded in the fraudulent transfer cases that were before him, and so when he talks about the constitution being a reason for him hearing something, he's talking about the issue of the withdrawal of the reference even though he admits that one of the things he could do even if he orders revocation of the reference is refer it back to the Bankruptcy Court for recommended findings and recommended conclusions. He says that, too, in the same opinion, actually in the same footnote or near it. I can't remember exactly.

So the first reason why it seems inconceivable to us that the District Court is going to revoke the reference is that even if the District Court decides -- and for many reasons that I'm going to discuss in a second we don't think that the District Court will decide -- that there's any

infirmity in this Court's jurisdiction to determine eligibility, the District Court's response is going to be the bankruptcy judge should enter recommended findings and conclusions, and, your Honor, if the District Court were not involved at this stage with that particular instruction, your observation that you could enter an order -- you could enter findings of fact and conclusions of law and a district judge on appeal who thought that there was a problem with this Court's jurisdiction could treat them as recommended orders, recommended findings, recommended conclusions, and deal with them on a de novo level as to facts and law, whereas in a straight appeal it would be de novo as to law, clearly erroneous as to fact, so that's the first reason, that withdrawal is not going to be the end result anyway.

The second reason, the courts -- you know, the -- when we discussed the -- when we're discussing the whole issue of whether or not the Bankruptcy Court should enter a dispositive order or a recommendation to the District Court, the vocabulary of deciding an issue was always the way it was discussed when you were discussing the issue with Mr. Montgomery and when I was discussing the issue here, and there is, of course -- if you think about it carefully and listen to it, there's actually something wrong with even talking about it that way because Stern at the end of the day is about the entry of a final order. Stern isn't about

interim orders or interlocutory orders at all, and it turns out that a determination of eligibility is an interlocutory order. There's about four cases that say so, and so that's another reason why it is not clear to us how it is that a district judge is ever going to decide that the reference would be revoked. You have even in jury trial cases cases where revocation of the reference is ultimately going to happen for some reason later. Those cases remain in the Bankruptcy Court for as long as possible almost through all discovery disputes, through all pretrial motions, and only the trial itself gets moved. So where you're dealing with an interlocutory order and when Stern is all about the final order -- and, in fact, in Stern itself the Supreme Court says we're not trying to change the way things work in Bankruptcy Courts, and you heard why.

THE COURT: Well, but I heard -- Mr. Montgomery argued or at least I heard him argue that what's key to the understanding of Stern is not the Court's authority to enter an order, be it final or interlocutory, but the nature of the issue that the Court has to consider in getting there. And if the nature of the issue involves federal constitution or the state constitution or the resolution of facts to determine -- that are necessary to determine constitutionality, Mr. Montgomery argues Stern says no to that.

MR. BENNETT: Well, I'll take it either way because there's -- there is other ways to approach the question even if one thought that it's discuss -- that it really is focusing on an issue. The fact of the matter is it isn't. It talks about a final determination of a state law claim. It does not talk about at all the components and questions that might come up in the course of it.

And I'm going to jump ahead to another part of my argument that I think is unbelievably important. It could not be that way because if what -- if you read Stern to say all you need to do to upset Bankruptcy Court jurisdiction, defendant who's unhappy being in the Bankruptcy Court, is raise an issue of state law that is ordinarily decided, if that was the only question, in a state court maybe with a jury, just raise it, then you've escaped the Bankruptcy Court, and, of course, that can't possibly be what Stern means. And, of course, we run into courts dealing with this precise problem in the mandatory withdrawal context where a defendant wants to get out of a Bankruptcy Court and all of a sudden fills its papers with supposed issues where there are collisions between bankruptcy -- the Bankruptcy Code and laws regulating interstate commerce. And the courts that have confronted those cases have been wiser or savvier than the defendants who tried this and say not so fast, that we are not going to look at all the things that you've introduced as

additional issues to try to determine whether or not interstate commerce is implicated. We're going to look at the claim, the claim that's pled and the kind of action that we're dealing with, and we're going to decide what's the real essence of the claim. And I think, frankly, Stern -- whether or not there's ambiguity -- and I, frankly, didn't find it myself -- I think it has to be focused on what is the claim, not is what does the defendants throw up to resist it, and what is the essence of the claim and the basis for relief, not the issues that might come up along the way. And so, again, my second reason --

THE COURT: Let me ask you to pause there with these two questions. First is are there any cases that actually say that, and by that I mean Stern focuses on the Court's authority to enter judgments and claims, not on the Court's authority to resolve the issues that need to be resolved to get to judgment?

MR. BENNETT: I don't know. I didn't have -- I did not have time to look for them, and I did not --

THE COURT: All right.

MR. BENNETT: I did not go look for them, but we did cite cases that have essentially the same epistemology as applied to the analysis of the mandatory abstention provisions, and they are in our brief.

THE COURT: Second question. The issue for today is

not should the reference be withdrawn.

MR. BENNETT: Exactly.

THE COURT: It's not will the District Court withdraw the reference.

MR. BENNETT: Right.

THE COURT: It's something much less than that.

MR. BENNETT: That is exactly --

THE COURT: We can debate the exact language, but it's something like reasonable likelihood of success or more than a mere possibility, so the question is even if you disagree with Mr. Montgomery's ultimate argument on the Stern question, the question is does his argument have enough merit to pass this test given that what we're talking about here is a stay?

MR. BENNETT: Well, I don't think -- I don't think so. I think the first point was enough in and of itself. We're not dealing with a jury trial right. We're not dealing with something that -- where this Court could not enter recommended findings and decisions, and so when you look at it from that perspective, even if the District Court were to decide that Mr. Montgomery is right there's a jurisdictional defect, we think that the chances that the District Court is going to say ship it up to me are zero; that what he will say at most is I'll take recommendations, and we'll move on from there. And for that reason alone, there is no reason to stay

this because that would effectively mean the reference isn't withdrawn even if there is a jurisdictional defect, so there's no reason to stay anything. That's number one.

The next argument on the list, which, frankly, I think is one that you mentioned earlier as well is we are very clearly dealing with a federal right here. We are not dealing with a private right. This is not an action to take away someone's pension. This is an action to determine whether Chapter 9 is applicable and to this particular available --

THE COURT: You mean whether the city is eligible.

MR. BENNETT: Is available to this particular -- to this particular city, and that -- I don't think we need to have a debate as to whether the Bankruptcy Code creates public rights or private rights. If you don't have the Bankruptcy Code -- and, of course, states don't -- there is no such thing as a debt adjustment scheme, so the Bankruptcy Code is not the echo or successor of some preexisting common law right. It was created as a matter of federal law because the constitution authorized the United States federal government to create the Bankruptcy Code, and they have the Bankruptcy Code. It is as federal right as they come. And eligibility is whether or not this particular municipality can invoke the federally created right. This is unbelievably analogous to all of the constitutional cases that have dealt

with whether or not you're entitled to an Article III court, for example, to get Social Security benefits or to challenge certain things with respect to Social Security or Medicare. All those cases come out the same way, that when you're dealing with the -- a federally created scheme and no preexisting state law right, the procedures you get are embedded in that scheme, and they're administrative law judges. That's why we have them. And that, frankly, is a judge that -- is a court that's got less judicial attributes than this court, so we are not -- and I'm pretty sure that when other administrative procedures come about, administrative law judges are told what you're doing, Judge, is unconstitutional usually with respect to the Fifth Amendment, but that doesn't mean the administrative law judge does not get to do his or her job in the context of administering a federal scheme. And there is no reason, quite frankly, why any arguments that have been made to undermine the authorization of this debt adjustment case do anything to change the character of the determination, which is whether the federal scheme is going to be applied in this case. And in that circumstance, your Honor, we think there is literally no, not even a possible amount -- there is literally no chance of success in this case.

And I want to make one more unrelated point. Your Honor may not have read ahead to our papers responding to the

eligibility objections.

THE COURT: I did.

MR. BENNETT: So then you already know -- and I think it belongs on the table in this context for the purpose that you are suggesting, which is whether this case is really at the edge and whether there is a possibility that there can be relief here. This all starts from the premise that there's something particular and exceptional about the treatment of pensions under the Michigan constitution. And as you know from our papers, there certainly is a section -- a separate clause that addresses it, but it's no different than the protection for contracts generally under the Michigan contract laws or, for that matter, for the protections that all contracts with states have under the contract laws of the United States Constitution. They are the -- the language of all these different protections are almost indistinguishable, and if the pension --

THE COURT: Okay. I can't permit you to argue the merits of the underlying constitutional claim. That's not what we're here for today.

MR. BENNETT: I was not arguing the underlying merits. I was pointing out the same -- I guess this is a -- this is a -- kind of the same point that the Bankruptcy Courts and the District Courts are pointing to when they talk about mandatory abstention, which is the argument here is

based upon this idea that there's a -- that this case is special; that the constitutional provision here is what's going to take it out of this court. Well, every single bondholder has one that has almost the same words that they can point to. You don't have a single bondholder here saying anything -- any reference has to be withdrawn. This is the -- I raise this only to point out that the argument of exceptionalism --

THE COURT: Million possible reasons for that.

MR. BENNETT: Pardon?

THE COURT: There are a million possible reasons for that --

MR. BENNETT: Or in any other --

THE COURT: -- none of which carry any particular legal weight.

MR. BENNETT: Or in any other case where bondholders have been on the other side of the eligibility question, for that matter.

THE COURT: You are certainly correct to the extent you are pointing out that Bankruptcy Courts since Stern have dealt with constitutional issues without objection from the parties or at least objection under Stern versus Marshall.

MR. BENNETT: I will go further.

THE COURT: What inference to draw from that is less clear, isn't it?

MR. BENNETT: I'm not sure, your Honor. I think that the books would be full of withdrawal cases, and they're not and which, by the way, there's a broader point here that wasn't --

THE COURT: Well, with all due respect to everyone involved, there are lots of reasons why parties might prefer where they are.

MR. BENNETT: Okay. True enough. I'm certainly not going to argue about that. Now, but while we're talking about, you know, what the cases say and don't say, let's now get back to the fact that we're dealing with a stay motion, and there is not a single case where a -- that was reported -- that was brought to you by the retiree committee or that we could find when we looked that enters a stay while a withdrawal for reference proceeding is going on in the District Court. There are, in fact, a whole bunch of cases -- I don't know how many. I didn't count them particularly --

THE COURT: Something tells me --

MR. BENNETT: -- but they were cited.

THE COURT: Something tells me that the lawyer in Stern versus Marshall who was in your shoes made the same argument.

MR. BENNETT: That -- okay. Well, at any rate, there -- oh, I see. Well, here actually -- but these are --

that's different. Stern made this argument for the first time, and it hadn't been squarely rejected. I'm saying that the cases in the books that deal with the stay, they squarely reject requests for stay pending motions to -- pending the hearing in the District Court of motions to withdraw the reference precisely on the grounds -- one of them precisely -- and I can't remember the name off the top of my head -- one of them precisely on the grounds that, wait a second, even if I was -- even if I were to find that there is a jurisdictional defect, the bankruptcy judge is just -- is going to give me recommended conclusions anyway, and the bankruptcy judge will figure out which is right, so there are actually cases --

THE COURT: You mean the District Court will figure out which is right.

MR. BENNETT: The District Court. Well, no. They say the Bankruptcy Court judge in the first instance will decide which he -- he or she decides to enter, and then the District Court will decide if he or she was right.

THE COURT: Oh, that. Okay.

MR. BENNETT: Let me move on to burden --

THE COURT: Okay.

MR. BENNETT: -- because if we're -- if your Honor believes there may be a case, albeit weak, with respect to withdrawal of the reference, which we respectfully disagree,

we then have to take a look at the comparative burdens, and here there is no -- once you focus on the correct question, which is how does the stay inflict a burden on the retirees, you find the answer that as a legal matter it doesn't at all. And I think the first place you need to go to see this is really the Chrysler case, and what the Chrysler case tells us is is that -- in Chrysler the opponents to the -- the people who were asking for a stay said we really need a stay while the District Court determines jurisdiction because if we don't get the stay, the sale process -- a sale process is going to continue, a 363 sale is going to continue, and the assets might be sold. And the Bankruptcy Court said, well, yeah, but you have rights if the sale isn't -- if the sale is implemented and the District Court decides I've made a mistake, you have a remedy, and the creditor said, well, no, we don't. This 363(m) that require -- that says that it's not stayed in the bankruptcy yet, you have to post a bond, and even if your ability to -- even if the ability of the courts to correct the situation is burdened by the requirement that a party has to post a bond, that isn't irreparable injury because the system has its own correction. And even though it has burdens along the way, you are stuck with them. And as your Honor pointed out, in this particular case no one has to post a bond, and there is a perfect mechanism for self-correction, which is if it is the case

that your Honor enters an order for relief and if it is the case that any of the -- that the retiree committee decides they want to appeal that decision on the basis that your Honor had no jurisdiction to grant it, then the District Court that receives it has your order, your findings, your conclusions. And if the District Court decides, no, there was a jurisdictional defect, he can then treat them as a recommended order, a recommended set of findings, a recommended set of conclusions of law and decide then on a de novo basis as to fact issues as well as for law whether or not to adopt them. There is no harm at all. The system has a self-correction mechanism built in. No constitutional rights are being lost in between. No constitutional rights are being trampled in between. And, again, it's a comparison.

Let's take a look at the city. As your Honor pointed out, this case is not about the automatic stay. This case is about getting a plan confirmed. There are cases I'm sure that your Honor sees in the business side where it's all about the automatic stay because no one has the faintest idea what their plan is going to look like. That's not this case. We need to get a plan done. We would like to get a plan done consensually. If we can't get it done -- plan consensually, we need to get a plan done another way, and we need to get it done quickly. The legion -- the reasons why we need to get

it done quickly are many. The most prominent are the short tenure of the emergency manager as a matter of law, but also and even more fundamentally, while we can do some things during this case to ameliorate the situation on the ground in Detroit, we can't do as much as we would like to do. Your Honor, I think, understands that. And, secondly, we are always focused on the decisions that people who live here and have businesses here have to make about whether they're going to stay and the decisions people a little bit outside the city or away from the city might be making about whether to come here or to have a business here. And, frankly, we don't think those decisions are going to get made until the outcome of this case looks a lot clearer.

On a more grubby detailed level, your Honor knows that financing is one of the things that we're looking for in connection with the hearing on assumption of the swap settlement, and if your Honor has taken the time to look at this aspect of Chapter 9 yet -- and I wouldn't blame you if you didn't -- you would find that while 921(e) has very effective protections for lenders who lend after an order for relief is entered, even if that order is reversed on appeal, there is kind of a vacuum in Chapter 9 for the protection that lenders would get in the event that they loaned before an order of relief was entered and the order of relief was not entered. We have good reasons why we think those orders

would be safe, too, but they require taking very, very, very close and careful looks at other sections of the Bankruptcy Code, and we think lenders are less comfortable in that environment, so, in fact, we have case-specific things that we need to do where having an order of relief or not having an order of relief soon makes a great deal of difference, so I would submit that there is no legally cognizable harm. I wouldn't just stand on the Chrysler case. There are several more I can discuss if you want to on that question.

THE COURT: Have you submitted an affidavit regarding this potential harm if the stay that is requested is granted?

MR. BENNETT: We did not submit an affidavit. We think it appears from --

THE COURT: How do you deal with Mr. Montgomery's argument that there's nothing about the relief he requests here today that would have any impact on the negotiations for a plan and Judge Rosen is going to crack heads at my request?

MR. BENNETT: Okay. Your Honor, the reality is that the entry or nonentry of an order of relief is going to have an enormous impact on the negotiations as I assume you would have suspected. It is not the case that that -- at least I hope it's not the case that the kind of negotiations we can have after the eligibility issue is behind us will be the same as the kind of negotiations we have today. So even on

the plan front, I think time is of the essence. This is not a -- this is not a perfect environment to be working in right now, which is why we originally proposed --

THE COURT: I hate to go there. Maybe I shouldn't. Feel free to decline to answer this question. Why is that? What is it about this case or more generally why do you argue that? What's the basis for that argument?

MR. BENNETT: Well --

THE COURT: And like I say, feel free to decline to answer that question --

MR. BENNETT: Well, I --

THE COURT: -- because I really don't want to know anything about your mediation discussions.

MR. BENNETT: And I'm going to go into the other -- precisely for that purpose, I'm going to talk about other cases. The idea of these prolonged eligibility contests starts in Vallejo, a case that could easily, by the way, become a Chapter 18 case because everybody got --

THE COURT: A new chapter.

MR. BENNETT: -- so tired in -- because of how long and how drawn out the procedures turned out to be that they actually had to stop repairing the finances of the city before they were done. And I think that what happened in Stockton similarly is going to -- when people look back on it -- whether it was a great idea at the time or not, when

people look back on it, they are going to decide that the nine months or so of the delay that was added to the Stockton eligibility contest as a result of the mediation in the middle, that that was just wasted time tacked onto the case. And for whatever reason I don't think in the case of Vallejo and I don't think in the case of Stockton they are dealing with the same level of deterioration in population and deterioration in business base that we are dealing with here. The macro problems are different. We need to convince the outside world that we're -- that, number one, we're making progress. That would help a great deal. More importantly, we're close to the end. I think that will be a really big deal and actually emerge from a proceeding. And so many other things that are going on in this community depend on it that it's really different than some of the other cases where the municipalities are smaller and in a lot of ways, as bad as their situations are, less severe than the situation is here. Speed is of the essence. Putting disputed questions behind us where we can will help resolve remaining issues that may be harder to resolve. And, again, we -- it is a prediction, not a certainty, but I -- the prediction is not grounded on a declaration, but it's grounded in the law which we just discussed, that getting a financing done before an order for relief is a very different story than getting a financing done after an order for relief.

THE COURT: And the fourth consideration?

MR. BENNETT: Fourth consideration is the public interest. We mentioned a few in your brief. Your Honor mentioned another one. You had another version of certainty. Some of the things that I've just described in terms of the importance of moving through this case quickly are about certainty. You raised another one. Retirees want to know. All the creditors want to know, but so do all the residents. So does anyone thinking of moving here or investing here. There is an enormous public interest in finding out how this case ends and, frankly, how -- and to a degree how much progress we're making, that we're kind of a track, that we're going in the right direction. It matters enormously on the ground here in Detroit.

THE COURT: Well, when I asked Mr. Montgomery about that, his response was, yes, of course, certainty regarding pensions is important, but the committee has decided a higher priority is having the right court decide the constitutional issues as far as at least the retiree committee was concerned.

MR. BENNETT: Well, okay. The only constitutional issue that your Honor is being asked to decide is the authorization question which has made Detroit be a debtor. That's the only question that you -- that is so far on the table. And we've pointed out that ultimately if they are

entitled to have a different court to decide that, which we do not agree, they're going to get that opportunity. That's going to happen soon enough. As soon as your Honor enters an order, if you deny -- if you dismiss the case and don't enter an order for relief, we all go home. They've won. If you enter an order for relief, findings of fact and conclusions of law, the next thing they do is go to the District Court. And there will be time for that decision. That's not going to get mooted out so quickly.

THE COURT: I hope you don't all go home because the problems will still be there.

MR. BENNETT: Well, but then you'll have to find that that solution, which is -- again, I said this, a federal scheme -- it's the only one -- that happens to be true. There is no other scheme, and I don't know what happens. And I think that's an important question everyone needs to ask, including the representatives of the pension committee, is, okay, if there is no -- if there is no proceeding, the city's financial condition is the same, and bondholders have all kinds of rights. Pensions have all kinds of rights, too. Everyone is owed a lot of money. The outcome of that will not be pretty.

THE COURT: All right. Anything further?

MR. BENNETT: Not unless you have any questions.

THE COURT: Thank you.

MR. HOWELL: Good afternoon, your Honor. Steven G. Howell, Dickinson Wright, special assistant attorney general appearing on behalf of the State of Michigan. Just wanted to state for the record that the State of Michigan concurs in the response filed by the City of Detroit, and we believe this Court should deny the relief requested and we should continue on the course that has been charted before us. Thank you, your Honor.

THE COURT: Thank you, sir. Anyone else before we get back to Mr. Montgomery? Sir.

MR. MONTGOMERY: Thank you, your Honor. I'd like four extremely brief points. One is that, of course, going straight to the District Court eliminates a layer, and under some circumstances that might actually yield a faster result.

Second point that I'd like to make is that the city's concession in the context -- the undisputed context that eligibility is a core issue, that there is a possibility that your Honor has to make recommended findings means there is at least -- at least a possibility that the Court lacks the jurisdiction to hear the matter, so I think from the city's vantagepoint, as argued to you, the issue is not zero to mere. It's really whether or not mere has gone to material in terms of possibility.

Third point. Eligibility is a federal right, but Bekins teaches us that it depends on state consent, and the

case law, including the Stockton case and the others, are uniform that it is state law that drives that determination, not federal law.

And the fourth point I would like to make to your Honor is that the huge difference between the Chrysler case and this case is that, in fact, you could bond an appeal in the Chrysler situation and stop the disposition of the assets, and here there is no bonding of an appeal from an eligibility determination. 921 says that's impossible. Thank you, your Honor.

THE COURT: All right. The Court will take this under advisement and issue a written opinion hopefully in the next few days, so let's turn our attention then to the motion to compel filed by AFSCME. Ms. Levine, are you going to argue that?

MS. LEVINE: Thank you, your Honor. Sharon Levine, Lowenstein Sandler, for AFSCME. Your Honor, I'm almost a little bit sorry that we have to be here again on a discovery dispute. Our hope was and we thought we had made it clear in connection with our response to the motion to quash is to really just get an understanding of the events that led up to the filing on July 17th and July 18th, and we're, frankly, a little bit dismayed that your Honor issued a scheduling order on August 2. We filed in compliance our objection on August 19th. We gave notice to the world of the discovery that we

wanted to take and the depositions that we wanted to take on August 23. It took awhile to reach agreement with the city with regard to limiting those depositions and a schedule for those depositions. We had to confront the motion to compel by the state. Your Honor issued a decision.

THE COURT: The motion to quash?

MS. LEVINE: Sorry. Issued a decision on the motion to quash on the 10th. We overcame through a meet and confer on the 9th the -- on the 10th an opposition that was filed on the 9th with this so-called deliberative privilege. Now, according to the response that was filed by the city to this motion, we learned that they drew up a common interest agreement on the 12th. We rushed to take a deposition to accommodate Mr. Orr's availability on the 16th, having gotten literally thousands of documents over that weekend, only to learn that there was, in essence, a new privilege that they were claiming that was substantially the same in breadth as the deliberative process privilege, which prevented us from questioning Mr. Orr on precisely the scope of information that we had clearly identified was what we were looking for, so I'd ask your Honor to let us redepose him very briefly on just those issues and to also ask everybody to identify for us if I'm just not knowing what the privilege of the month is so that we can know that on a go forward basis the privilege is attorney-client privilege and/or work product privilege,

but if there is another privilege that I'm omitting, I'm just not smart enough to think of as we're standing here today, I'm asking to have it identified so that we can address it and discuss it with the Court before we go forward with more depositions that potentially just result in having the witness directed not to answer.

Your Honor has read everything, as far as I can tell, every time we've been here, so unless you need me to run through the case law, we would look to the Court for some direction.

THE COURT: Well, I think it would be helpful to hear your -- how you deal with the privilege claim that was made, this --

MS. LEVINE: Your Honor --

THE COURT: -- common interest claim.

MS. LEVINE: -- we understand that when there's a common legal theory and you're really truly doing a joint defense to a litigation that the defendants often confer in terms of what is tantamount to work product and litigation strategy, but when you're dealing with an issue like eligibility and the core inquiry in connection with the eligibility is the good faith and/or to the extent we -- you know, we haven't yet grappled with that, but to the extent there are factual issues with regard to the as applied issue of authority, these are -- this is the very nature of

proving -- their proving good faith and authorization and our ability to challenge that good faith and authorization, so when we're dealing with this commercial kind of issue, this factual kind of issue, we respectfully submit that it's different than simply launching a defense on a common legal theory to a litigation claim.

THE COURT: Um-hmm. Okay.

MS. LEVINE: Unless your Honor has any questions, thank you.

MR. BENNETT: Bruce Bennett, Jones Day, on behalf of the city. I think -- I don't understand the preamble because I think we're overstating matters just a little bit. There's been a lot of cooperation in discovery. Everybody has been able to get the depositions they need taken. There was a waiver of one privilege, which was the deliberative process privilege, and then Mr. Orr was deposed. This is the transcript, and I don't know if your Honor looked at it, but this is really bad for old people like me because the type is unbelievably tiny. This is a huge transcript. There are disputes over 12 questions or 11 questions. I can't remember exactly how many there are, but that's it in this whole -- I don't remember -- 135-page times four transcript, so that's first of all. We have, in fact, the demonstration of a very cooperative discovery process with no material obstruction and a disagreement over 12 questions or 11 questions or

however many it is.

It wasn't a secret to them that the attorney-client privilege was going to be claimed by everybody. No one waived any aspect of the attorney-client privilege, and that is the privilege that was invoked. Their assertion is you've waived the attorney-client privilege by reason of the fact that there was a discussion between Mr. Orr and the governor and a lawyer.

THE COURT: Don't jump there. Start me in baby steps here.

MR. BENNETT: Okay.

THE COURT: What questions did Mr. Orr refuse to answer, and what was the basis for claiming a privilege in support of that refusal?

MR. BENNETT: Okay. First one is -- here's the exact question. You're going to want me to read a little bit before that. "Okay." Question: "Okay. What did you discuss about the litigation with braid" -- and there's the word "error" there, which I don't think is right, but I think that's somebody else's name -- "and Gadola?" That was objected. The person was a lawyer, and so I think we're talking --

THE COURT: Which person was a lawyer?

MR. BENNETT: Gadola is a lawyer; correct? Gadola is lawyer. So there was a -- apparently a meeting

involving -- okay. You got to go further. Oh, Brader is the other person. Valerie Brader and Mike Gadola were the two persons.

THE COURT: So those two are lawyers.

MR. BENNETT: For --

THE COURT: Whose lawyer?

MR. BENNETT: For the state.

THE COURT: They're the state's lawyers, so Orr is being asked about a conversation with lawyers for the state?

MR. BENNETT: I think the governor was also in the room. Is that the --

MS. LEVINE: Your Honor, we're not asking for conversations between Mr. Orr and his counsel and Jones Day.

THE COURT: That was going to be my next question.

MS. LEVINE: Okay. What we're --

THE COURT: But who else was there?

MR. BENNETT: I have to read back.

THE COURT: Let's assume for a minute the governor was not there. Why is Mr. Orr's conversations with someone else's lawyers protected by the attorney-client privilege?

MR. BENNETT: Well, because, as we set forth in our papers, it's not just anyone else. The governor, of course, appointed Mr. Orr but also can remove Mr. Orr. There is the -- the state government has a series of continuing ties to the things Mr. Orr can do, including approving

expenditures of over $50,000, and there's a whole bunch of other different things. They're all -- the list is in our papers. He is paid by the state, by the way, and his protective detail is provided by the state. I think the sum total of that under the state law is they're supposed to be coordinating, and, quite frankly, I think this Court wants to encourage them to be coordinating. And if they're going to be coordinating and they're going to be talking about legal issues, those discussions should be privileged. They clearly have a common interest. None of the cases define it as a common legal theory. The cases talk about interests relating to legal things, and, quite frankly, we believe that the entire fiscal emergency and all of the solutions to it -- in this period we're talking about out-of-court solutions potentially -- there's no Chapter 9 had been filed yet -- those conversations have to be privileged, that the governor has to be able to talk to Mr. Orr's lawyers, and Mr. Orr has to be able to talk to the governor's lawyers. And, frankly, Mr. Orr's lawyers and the governor's lawyers have to be able to talk to each other, too, in an environment where what they say can't be invaded by others so that they can talk about with candor all of the things not only that they're thrilled about but things that they're bothered by.

THE COURT: What other questions, or does that discussion cover all of those?

MR. BENNETT: That discussion I think covers all of the questions, but I'm happy to go through them. They're hard -- they're going to be tough for me to read, but I can find them all. They're highlighted.

THE COURT: But what we're looking for are questions that were asked of Mr. Orr other than of discussions he had with these two attorneys who were attorneys for the governor.

MR. BENNETT: I think that's all the ones that were objected to. Were there others?

MS. LEVINE: Your Honor, basically the problem is, though, that the line of questioning was shut down because what we were trying to understand was the -- you know, the conversations that took place between the emergency manager and the state, the governor and his inner circle, leading up to the filing of the Chapter 9 petition.

THE COURT: Unfortunately, I've just been advised that in order for your statements to be on the record, I need to have you near a microphone and preferably the podium. Preferably the podium, please. So let me just try to pin it down as efficiently as we can here. You want to ask questions of Mr. Orr about his conversations with individuals who were attorneys for the governor.

MS. LEVINE: Your Honor, what we're looking -- we're not looking to -- there's the state and its attorneys --

THE COURT: Right.

MS. LEVINE: -- and there's the city and its attorneys.

THE COURT: Right.

MS. LEVINE: But any combination of those, our view is that's not an attorney-client privilege. In other words, if I talk to --

THE COURT: Right. So that was my -- that was my question. You want to --

MS. LEVINE: That's really what we --

THE COURT: You want to ask him questions about his conversations with the governor's attorneys and with the governor --

MS. LEVINE: Yes.

THE COURT: -- but not necessarily about his conversations with his own counsel.

MS. LEVINE: Correct. No, no. I'm not looking to ask the governor what he said to his lawyer --

THE COURT: Or Mr. Orr --

MS. LEVINE: -- or what he might have heard --

THE COURT: Yeah.

MS. LEVINE: -- the governor say to his lawyer.

THE COURT: Okay.

MS. LEVINE: I'm not looking for two-party attorney-client privilege conversations. We disagree with the concept that there's a four-party attorney-client privilege.

THE COURT: Okay. Okay. So, Mr. Bennett, you addressed why you think there's attorney-client privilege that protects Mr. Orr from testifying about his conversations with the governor's lawyers. How about his conversations with the governor himself?

MR. BENNETT: Mr. Shumaker did not object to any questions that were asked about the -- the conversations between the governor and Mr. Orr where lawyers were not present were never objected to. All of these questions deal with questions about meetings that were attended by a lawyer for the governor.

THE COURT: All right. So why would every question that Mr. Orr might be asked about his conversation with the governor even when a lawyer was present be privileged?

MR. BENNETT: Well, it might not be, but the first question I started with -- and, frankly, I think it's up to my opponent to point out a question that wasn't like this -- "Okay. What did you discuss about the litigation with" -- and it must have been Brader now that I see this -- "and Gadola?" And I have to tell you I can't think of a more privileged question in the world.

THE COURT: Well, but that wasn't my question.

MR. BENNETT: I know that. I don't know what the other one -- I don't know which other questions, whether -- I don't know whether any question was asked.

THE COURT: Well, but Ms. Levine says that the line was shut down.

MR. BENNETT: Actually, your Honor, that's just not true. If your Honor wants to read ----

THE COURT: All right. I don't want --

MR. BENNETT: -- the deposition transcript, you will find that all --

THE COURT: I don't even want to go there.

MR. BENNETT: Okay.

THE COURT: I want an answer to my question, which is do you concede that there are questions that Mr. Orr -- do you concede that there are questions that Mr. Orr should answer about his conversations with the governor even with counsel present?

MR. BENNETT: Yeah. It is possible that there was -- it is possible that you could pose a question that does not involve any legal advice and that would not be privileged. I don't know that they did, and I don't think they did. And I want to be very clear about this. No one shut anybody down, but the questions that were asked, at least the ones I remember -- and I'm happy to have --

THE COURT: Let me ask Ms. Levine. Would you return to the podium? You can both stand there; right. Can you point to a question that Mr. Orr was asked about a conversation with the governor directly which Mr. Orr was

instructed not to answer?

MS. LEVINE: Your Honor, maybe it was our mistake during the course of the deposition, but we didn't go through the whole line of questioning having them direct each time for him not to answer. Our understanding was basically that for that period of time, virtually all of the -- we were led to believe that virtually all of the conversations that took place between anybody on behalf of the city and anybody on behalf of the state also included somebody from counsel and that, therefore, there really weren't going to be any conversations that they could discuss with us in the, for example, two weeks leading up to the filing of the Chapter 9 petition.

THE COURT: Um-hmm, um-hmm.

MS. LEVINE: So, you know, we had a limited deposition.

THE COURT: All right. So let's just assume that for purposes of resoling this motion the Court needs to resolve the issue of attorney-client privilege and this common interest doctrine.

MS. LEVINE: Thank you.

THE COURT: All right. So is there anything further you wanted to say on that legal question in the circumstances here?

MS. LEVINE: Your Honor --

THE COURT: I was asking Mr. Bennett, and then I'll get back to you.

MR. BENNETT: I think I may have gotten there already, and I think our papers are clear, but the -- first of all, number one, there is absolutely clearly a common interest concerning what the state wants to achieve with respect to Detroit and what the emergency manager wants to achieve with respect to the City of Detroit, and the entire statutory scheme is one that contemplates that they're working together on some level. And if they're working together on some level, they have to communicate. And if they have to communicate, they clearly have to communicate about legal matters, and those discussions absolutely have to be privileged. Otherwise they're not going to happen, and that would be the worst of all possibilities.

THE COURT: I'm not sure why it matters, but are the attorneys that were mentioned here, Mr. Gadola and -- what's the other one --

MR. BENNETT: Valerie Brader.

THE COURT: Brader?

MR. BENNETT: Yes.

THE COURT: -- from the attorney general's office or the governor's own like legal counsel, which I don't even know if he has?

MR. BENNETT: You got me on that one. I don't know.

THE COURT: Anybody know? Mr. Howell.

MR. HOWELL: Thank you, your Honor. They are the governor's counsel. They are the chief legal advisor and deputy chief legal advisor to the governor in the governor's office.

THE COURT: Thank you. Thank you for that, sir.

MR. HOWELL: And it's Michael Gadola and Valerie Brader.

THE COURT: Thank you.

MR. BENNETT: Okay. The second part is that there was apparently a complaint of when the document actually got done. The truth of the matter is the common interest exception to the waivers of attorney-client privilege may be founded on a verbal agreement, an oral agreement. The cases are crystal clear about that. And that was actually reached way back in March, and I think if we need to demonstrate that further, I believe that we can. I think that the papers are adequate and describe clearly that we meet all of the relevant tests to be able to assert the attorney-client privilege in these circumstances and for the state to be able to assert the attorney-client privilege in these circumstances.

THE COURT: Any reply?

MS. LEVINE: Your Honor, we'd respectfully submit that there are at least two issues out here where this can't

be the right result if, in fact, we're going to have a meaningful inquiry into the facts surrounding a good faith filing. We need to -- we need to be able to question, and we can't have all of the decision-makers shielded by the attorney-client privilege for the two-week period leading up to the bankruptcy filing. In addition --

THE COURT: Well, let me ask you about that. Even if I were to agree with you that this is necessary for your inquiry, that there are no other sources of available evidence on these points, is there such an exception to this privilege in law?

MS. LEVINE: Well, the answer, your Honor, is twofold. I'm not sure that -- I think that what that does is that takes the privilege out of context. I don't think the privilege needs an exception. I think the problem is this takes the privilege out of context --

THE COURT: Um-hmm.

MS. LEVINE: -- number one. Number two --

THE COURT: Why or how do --

MS. LEVINE: -- itself --

THE COURT: Okay.

MS. LEVINE: -- has shown up in the court in two capacities. Okay. They're here supporting the appointment of the emergency manager and moving forward here, but they're also separately looking into and potentially defending issues

related to 436, so --

THE COURT: Well, you say the state, but the state is --

MS. LEVINE: In and of itself there's an inherent --

THE COURT: -- like a lot of different people. I know the attorney general's position might be characterized as you have said. I'm not sure the governor's is.

MS. LEVINE: Us either, Judge, and that's the -- that's part of the problem. In other words, if what's happened here is all of the decision-making and all of the conversations that would shed light on good faith happen because there's an attorney in the room, we'd respectfully submit that that's an improper use of the privilege. You can't take factual decision-making and make it all -- and make it attorney-client privilege. There has to have been an independent deliberative process by the governor and by the emergency manager with regard to coming to the conclusion and reaching an understanding with regard to why they made those -- the decisions that they made coming up to this process. And for us not to be able to inquire with regard to the nature of the good faith of that decision-making process prevents us from doing the analysis we need to do to determine whether or not the Chapter 9 petition was actually filed in good faith and whether or not the authority as applied was an appropriate application of the authority.

THE COURT: Um-hmm. Mr. Bennett, isn't it the case that two individuals, even assuming their legal interests are aligned in any given context -- isn't it the case that they can't shield the conversations between them that would otherwise be discoverable just by having an attorney in the room?

MR. BENNETT: That's certainly right.

THE COURT: So when is it that the conversations between the two individuals is protected because there is an attorney in the room?

MR. BENNETT: When legal issues are being discussed and they're talking about legal -- when they're talking about legal advice or when they're sharing facts for the benefit of the lawyer so that they can get legal advice. The communications that are privileged, as I remember it, are the legal advice itself and the --

THE COURT: So if the governor and Mr. Orr are having conversations about the financial necessity to file bankruptcy, is that discoverable even if there's an attorney listening in?

MR. BENNETT: If they're talking about the numbers, what are the numbers, that's an easy case for me. You could get discovery as to their conversation as to what the numbers are. If the issue became they're talking about the numbers and they're saying, "Are these numbers numbers that would

meet the definition of insolvency as that term has been embellished by the cases -- in the Code and embellished by the cases?" then I think you're talking about conversations that are, in fact, protected and, frankly, questions that no one has got a legitimate interest of inquiring about. The premise, which I think is leading to your questions, that -- and which is where Ms. Levine starts, which is inquiry has been foreclosed, is belied by this. We're talking about 12 questions in a 150-page -- well, a 400-, 500-page transcript.

THE COURT: No, but I have to accept the implication in the fact that Ms. Levine took the time and trouble to file this motion that this is an important inquiry for her, so I'm just going to accept that at face value, but I guess part of what I'm struggling with here -- and I think maybe Ms. Levine, too, is -- if the governor was willing to waive the deliberative process privilege, to the extent there was one and it applied, in order to move this bankruptcy forward on the issue of eligibility, why are there any different considerations here?

MR. BENNETT: This is different in kind. The reason we have an attorney-client privilege is because we want the governor to be able to unburden himself and share his innermost doubts, concerns, and legal problems with lawyers to get effective legal advice. And if he does that in front of Mr. --

THE COURT: But that's the same premise as the deliberative process --

MR. BENNETT: Actually --

THE COURT: -- except that it's not with attorneys. It's with others.

MR. BENNETT: Well, except when you're -- but the deliberative process is likely more about facts as opposed to exposures which may be the subject of future litigation, and the last thing in the world that I think anyone would have contemplated is if they show up and say, "Well, you know, the governor's private attorneys expressed some substantial doubts about this as part of a presentation of a case before you." I can't imagine that the way our adversary system is supposed to work is supposed to generate those kinds of results in courtrooms.

THE COURT: All right. In answer to my -- I'll get to you. In answer to my question of why the governor would waive the deliberative process but not -- the deliberative process privilege --

MR. BENNETT: Right.

THE COURT: -- but not this privilege, your answer was there is an attorney-client privilege.

MR. BENNETT: No. I think -- I didn't say that. I think that --

THE COURT: Accepting that --

MR. BENNETT: Yeah.

THE COURT: -- why would he waive one and not the other if his interest in the waiver of the one was to get to eligibility as efficiently and fairly as possible, which I commend it?

MR. BENNETT: He didn't ask me, so this is speculative, but you could say that the deliberative process, to the extent there was debate about numbers, he might say, "Okay. I'm prepared to make that public for the world," or if it's about -- if it's discussions about how I viewed and how other people viewed the city's economic circumstances, how I viewed and how others viewed the state of services that were being -- yeah, there are many, many, many other things that are captured by the deliberative process exception that I can see why a client would decide, okay, I'm prepared for the world to take a look at that, but discussions with counsel about exposures to just put the narrowest possible point on it -- and I don't think it is that narrow, but do I believe for a second that the decision to waive the deliberative process privilege that might open up and illuminate facts and debates about facts, political facts, policy driving facts versus am I going to open up discussions that we had about potential litigation exposures, I think, frankly, those are different in kind, and I see a line. Don't know how I would draw it in every particular instance.

THE COURT: Um-hmm. Ms. Levine, anything further?

MS. LEVINE: Your Honor, I would just note that one of the things that we've been talking about that makes a difference in the bankruptcy process is that it's a difficult scary fast process, and transparency --

THE COURT: It's a what?

MS. LEVINE: It's a difficult scary and very fast process, and transparency helps. It just does. It's an understanding how we got here, even if we're wrong in terms of the allegations and the arguments that we've made with regard to our objections to eligibility, learning that through the discovery process or having all the facts presented to your Honor and having your Honor consider that when you're considering eligibility is a better place for a credible bankruptcy process than to say we have the code of silence. We're not going to tell you how or why we made these decisions to file. We're not going to tell you how or why we discussed these decisions between the city and the state, and we're going to hide behind a privilege and then determine that because you can't show any issues with regard to eligibility, the only thing that stands is our analysis with regard to why we are eligible.

THE COURT: Well, privilege always suppresses the truth, doesn't it?

MS. LEVINE: Your Honor, it's -- but the discussions

that we're talking about are the discussions between the state and the city. We're not talking about Mr. Orr having a one-on-one conversation with Jones Day or the governor having a one-on-one consultation with his counsel. We're talking about the process that took place leading up to the timing and the understanding of why the eligibility -- why the bankruptcy was filed when it was filed and how it was filed and what the rationale was for filing at that point in time. It's the who, what, where, when. Those are the basic types of facts that you look to in making a decision with regard to good faith and bad faith.

THE COURT: All right. Thank you. Who else wanted to be heard? Mr. Howell again, and then I'll get to you, sir. Seriously, I promise you.

MR. HOWELL: Thank you, your Honor. Again, Steven G. Howell appearing on behalf of the state. Just a couple things in response to your questions. In the deliberative process privilege and the decision to waive that, one of the factors in coming to that conclusion was that was to ask the governor why he made the decision he made, what factors influenced him, what he based his decision on outside of attorney-client privilege are questions that can be asked, it seems to me, and his deliberations in coming to the conclusion, and it seems to me that's what they want to know is how -- you know, what was the governor's conclusion and

what -- you know, what made him come to that conclusion. And outside of the attorney-client privilege, those questions can be asked and answered it would seem to me. But when you get to the attorney-client privilege, the whole core to that is that you have to be able to have open and candid discussions. You have to weigh the alternatives. You have to look at the risks, and you have to know that that discussion with your counsel is protected. Now, when you carry that over to the common interest --

THE COURT: But that's a -- that strikes me as a gross overstatement of the privilege.

MR. HOWELL: Well --

THE COURT: I mean all of that only works if the questions are legal questions.

MR. HOWELL: Are legal. I was going to make that point, your Honor.

THE COURT: Okay.

MR. HOWELL: I'm not trying to argue that this is outside of that, but what I'm saying is that the workings between the governor's office and the emergency manager under the statute, under the bankruptcy are very close. They have to work together. There are instances, in fact, where the state is obligated to defend the emergency manager in certain actions that he takes. He's appointed by the state. I mean the relationship and the common interest is clear and

unquestioned. The only thing we're trying to protect is the obtaining of legal advice and the belief that the common interest is an extension of the attorney-client privilege and that when those interests are common and you're working together in dealing with those issues -- and they are legal issues -- that that is protected, your Honor.

The only other point I'd like to make is there was an argument relative to waiver as to the state, and that, you know, was raised in the motion filed yesterday. And I would just say the motion that was filed to quash was to significantly limit, if not stop some of the discovery on arguments that were made. It did not then go into a whole lot of other privileges that are driven by questions or particular documents, and, in fact, the motion to quash specifically referenced that and said this -- you know, we reserve on -- in paragraph 7 of the motion to quash, we reserve on privileges for a later date, and those privileges were reserved in that motion originally. And when the discussions took place and there was, in fact, an agreement reached, dates were set, and we're working on that trying to finalize the order, and productions will occur, and at that point logs will be turned over and documents will produce and issues will be raised at that point but not the deliberative process. And in that discussion we said the deliberative process, but all others were reserved. And the primary one

that we're concerned about here today is the attorney-client privilege, and we believe that that is very important. It is legal issues, and it is legal issues discussed with counsel among the two teams that are trying to take this case forward and trying to bring this to a successful conclusion, your Honor. Thank you.

THE COURT: Sir.

MR. CIANTRA: Thank you, your Honor. Very briefly, Thomas Ciantra, Cohen, Weiss & Simon, here for the UAW. We join in the motion that AFSCME has made, and I just wanted to draw attention to a couple of particular points. One, I believe that the city and now the state have grossly overstated the scope of the common interest doctrine. All right. The case law, we think, which is set out in the Libbey Glass case that's cited in AFSCME's papers makes it very clear that the common interest that has to be involved is a common interest, a common legal interest. It is not sufficient to rely upon the common interest that the state and the emergency manager are looking to achieve with respect to the overall restructuring of the City of Detroit's finances. It's a much more limited doctrine. And the limited scope of that doctrine we submit is particularly important here because of the public interest in the transparency of government decision-making that is involved here and that had been placed in issue by the objections to

eligibility that the UAW has filed and that other parties have filed in this case, so the scope of that exception is very critical because what -- it seems from our perspective that what is the common interest here is in shielding those discussions, in shielding those directions, in shielding the course of action that was decided upon.

Second point that I just wanted to briefly make is that this issue is not only with respect to a dozen questions that were raised at Mr. Orr's deposition. Reference was made earlier to document production in this case. Last Friday we received literally tens of thousands of pages of documents that were produced by the city on an expedited basis. Obviously we have not received a privilege log. One could not expect that. However, I would expect, based on the position that the city has taken, that that log is going to be very long and detailed indeed because we are certain that there are multiple documents, e-mail communications, memos, other things that would have passed between these parties that would be comprised by this, so it's not just a question of a discrete number of questions asked in a deposition. It really goes to the heart and soul of the eligibility objections that have been raised. Thank you.

THE COURT: Thank you.

MS. GREEN: I will also be brief. Jennifer Green on behalf of the General and Police and Fire Retirement Systems.

Speaking of the privilege log, there was a privilege log produced on Friday, September 13th. There were just under 11,000 documents that are claimed to be privileged. Out of those 11,000 documents, we have so far determined that there are roughly 400 to 600 documents that they are claiming are protected by the common interest privilege.

On Monday, during Mr. Orr's deposition, the city appeared to limit this common interest privilege to -- and I'm going to quote from the deposition -- "what Mr. Orr has been doing since he became emergency manager where there was a common interest between the state and the emergency manager's office," and I believe today counsel limited it to that as well. And we all know the emergency manager was not appointed until March of 2013. The Chapter 9 proceeding obviously began in July of 2013. The privilege log, however, asserts the common interest privilege as far back as December 15th of 2011, well before the emergency manager was ever appointed, and so that raises a concern about whether or not this privilege is being abused and whether it's being asserted too broadly.

Today in the papers filed by the city they have characterized the common interest between the city and the state as, quote, "they share a common interest in rectifying the financial emergency of the city," which may be a political or may be a commercial interest, but I don't think

that that's necessarily a legal interest that they share in common.

The other thing that's of concern is in the privilege log these communications are -- there are some that are without any counsel between -- it'll be, for instance, Andy Dillon, the state treasurer, or Richard Baird, who is not even a state employee. My understanding is he is a consultant who is -- has some sort of contract with either the State of Michigan or with the governor, and he's all of a sudden part of this common interest privilege, so that is our concern. And while we concur with AFSCME's motion and support the relief requested today, there may be another issue relating to these documents that may need to be raised with the Court at an appropriate time, and we would like to ask that today's ruling perhaps be without prejudice in case we need to file a motion to compel on the documents themselves. We would obviously like to raise the issue with the city. Perhaps we can work something out without having to involve the Court --

THE COURT: Okay.

MS. GREEN: -- before that. One last thing dovetailing with what the UAW mentioned. There is a Sixth Circuit case called Reed versus Baxter -- it's 134 F.3d 351, 1998 case -- that talks about the need to prevent the abuse of the attorney-client privilege where it is a governmental

entity or a governmental actor that is asserting it. And in that case they say that courts and commentators have cautioned against broadly applying the privilege to governmental entities. The recognition of a governmental attorney-client privilege imposes the same costs as are imposed in the application of the corporate privilege but with an added disadvantage. The governmental privilege stands squarely in conflict with a strong public interest in open and honest government. And that's sort of what we face here is, you know, we have questions about decisions that were made the day of the filing, and we asked questions about were contingencies discussed, did you and the governor have a meeting on July 18th, and they said, "Well, counsel was there. We're not answering."

THE COURT: No, but pause there. Does that Sixth Circuit case impose any identifiable functional restriction on the attorney-client privilege in the context of a governmental officer claiming it?

MS. GREEN: In that case it was -- I believe there was a city council member and another officer of the city, and the Court said your legal interests were not identical. They were not aligned. And in this case, even if their political or maybe commercial interests were aligned, it's not necessarily clear that their legal interests were aligned, and that would be our objection.

THE COURT: All right.

MS. GREEN: Thank you, your Honor.

THE COURT: All right. I'm going to take this under advisement and come back into court at 5:15 with a decision.

THE CLERK: All rise. Court is in recess.

(Recess at 4:54 p.m., until 5:31 p.m.)

THE CLERK: Court is in session. Please be seated.

THE COURT: The record should reflect that counsel are present. The Court concludes that the common interest doctrine does apply in these circumstances. The Court so concludes based on this analogous hypothetical. As we all know, when a corporation files bankruptcy, its board of directors must give its consent, must authorize the filing. Ordinarily, of course, the corporation itself would have its own counsel giving it advice on whether to file bankruptcy, what the ramifications would be, what possible reasons there might be not to file bankruptcy, et cetera, et cetera. Ordinarily the board of directors would not have its own separate counsel in that process. It would rely on corporate counsel, but it could. A board of directors could hire special counsel to advise it on whether to authorize the filing or not. Assume for a moment it did, and then the board or members of the board, its lawyer, the corporation's lawyer and corporate management all met together. It seems clear enough to this Court that the common interest doctrine

would shield those conversations even though technically the corporate attorney does not represent the board and the board's attorney does not represent the corporation. The Court cannot identify any way to distinguish that case from our case.

Now, having come to that conclusion, that does not mean that every question that Ms. Levine or others want to ask of Mr. Orr in this case is protected by the attorney-client privilege, and here it becomes hard for -- really impossible for the Court to rule specifically. I can give you some general guidance, and I'm willing to do that, but the application of the attorney-client privilege can only be adjudged on a question-by-question basis.

Here's the general guidance I'm willing to give to you, for what it's worth, and then an offer. If the conversations among the governor, the governor's lawyers, Mr. Orr, and/or Mr. Orr's lawyers were for the purpose of seeking legal advice from the lawyers about the bankruptcy, then it's protected. If the conversations were, for example, between Mr. Orr and Mr. Snyder for other purposes, for example, to discuss the political ramifications of the bankruptcy or for other purposes I'm too naive to fathom, then it would, it seems to the Court, not be protected by the attorney-client privilege. And I don't know what more to tell you at this point except to make to you the offer I

think I made to you before, which is when you're sitting in a deposition and you come to a disagreement about whether the privilege applies to a specific question, you can get me on the phone, and I will resolve it on the spot if I at all can, but I make that offer with the caveat that the guidance that I just gave you is probably the guidance I'm going to follow, and you can figure it out as well as I can, so I don't know what more to say except that sort of technically the motion to compel that's before the Court is granted in part and denied in part. I will allow a further opportunity with the guidance that I've given you for Mr. Orr's deposition. I'm sure you'll be able to find a mutually convenient time for that.

Is there anything else I can help you with here today?

MS. LEVINE: Thank you, your Honor.

THE COURT: All right. We'll be in recess then.

THE CLERK: All rise. Court is adjourned.

(Proceedings concluded at 5:36 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett September 26, 2013

Lois Garrett